In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5397

LOREN CRAIG SIMS,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE ATTORNEY GENERAL FOR THE STATE OF UTAH RESPECTFULLY SUBMITS THE BRIEF IN RESPONSE.

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STATEMENT OF JURISDICTION

Respondent respectfully challenges the jurisdiction of this Court generally to hear the petition here involved and specifically to pass on points three and seven contained therein. The general challenge of jurisdiction is made pursuant to Rule 19, Rules of the Supreme Court, 28 U.S.C., which states that in order for this Court to grant certiorari it must be found that the state court decided a federal question of substance in a way not in accord with applicable decisions of this Court. Respondent respectfully submits that no federal question of substance found in the petition here presented were decided in a manner inconsistent or in contradiction with applicable decisions of this Court.

Specifically respondent asserts that the Court lacks jurisdiction to pass on points three and seven of this petition since said points were never presented for review before the Supreme Court of the State of Utah. Therefore, the Utah Supreme Court has made no decision with regard to these questions which would warrant review by this honorable Court.

Aside from the general and specific challenge set forth above, respondent respectfully submits that substantial federal questions are found only in points one, two, four, five and ten. The remainder of petitioner's allegations, points six, eight, nine, eleven, twelve and fourteen, are questions of fact or procedure which are subjects of state law and, therefore, lack the substantial federal elements required for review by this Court.

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QUESTIONS PRESENTED FOR REVIEW

1. Was evidence obtained in violation of Petitioner's rights introduced at trial?

2. Did the State's investigation violate petitioner's rights?

A. Was an illegal search of petitioner's home conducted?

B. Were petitioner's constitutional rights violated by the introduction into evidence of certain statements made to sheriff's deputies?

C. Were petitioner's Sixth and Fifth Amendment rights violated when F.B.I. agents testified as to fiber samples, blood spots and semen spots found on petitioners clothing?

D. Was constitutional error committed in the handling of petitioner's clothing?

E. May the introduction of photographic evidence now be challenged?

3. May petitioner now claim constitutional error in the selection of the jury when such an objection was not raised in state court proceedings?

4. Are Sections 76-30-1 through 76-30-3, Utah Code Ann. (1953) unconstitutional?

5. Was petitioner's right violated when the trial court refused to grant a change of venue?

6. Did the testimony of Robert Yockey violate petitioner's constitutional rights?

7. May petitioner now assert a claim of double jeopardy when such a claim was not raised in any state court proceedings?

8. Did the trial court's instruction with regard to reasonable doubt violate petitioner's constitutional rights?

9. May this Court rule on the exclusion of certain testimony by the trial judge?

10. Is the Unitary jury constitutional as applied in this case?

11. Could the jury render a fair verdict?

12. In general, did the investigation and trial provide petitioner with the fairness guaranteed by the Constitution of the United States?

13. Can this Court now pass on the sufficiency of the evidence before the jury?

14. Did the decision of the Utah Supreme Court deny petitioner of his right to due process?

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6397

LOREN CRAIG SIMS,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

STATEMENT OF THE CASE

The petitioner seeks a writ of certiorari to the Supreme Court of the United States to review two separate decisions. In the first of these decisions *State v. Sims*, 30 Utah 2d 251, 516 P.2d 354 (1973), petitioner's conviction of first degree murder under the felony murder rule, Section 76-30-3, Utah Code Ann. (1953), for the death of Linda Huntsman which resulted in connection with perpetrating the crime of rape on her was affirmed. The petition seeking review of this decision is the subject of this response.

With regard to the petitioner's murder conviction, the following facts were disclosed at trial. Mrs. Charlene Patterson, a nurse, lived with her son Gerald in an apartment in suburban Salt Lake County. She worked the night shift from 11:00 p.m. to 7:00 a.m., at Latter-Day Saints Hospital

in Salt Lake City and employed Linda Huntsman, a student nurse, as an all night baby sitter. On March 22, 1972, at about 10:00 p.m., petitioner Sims, who had on occasion dated Mrs. Patterson, arrived at the apartment. Mrs. Patterson requested that petitioner drive her to work. Petitioner left his wallet at the apartment before he left. Sometime after driving Mrs. Patterson to work, petitioner returned to the apartment. He knocked on the door until Gerald answered. He then asked Gerald if his mother was home. When Gerald answered that she was not, petitioner told Gerald to get his wallet from a sewing machine located in the den of the apartment. Gerald returned with the wallet.

After being at work, Mrs. Patterson noticed her glasses were missing. At about 7:00 a.m., she called home to ask Miss Huntsman to bring the pair of glasses when she came to pick her up from work. The phone rang and was finally answered by Gerald. Mrs. Patterson asked Gerald to see if Miss Huntsman was awake. After trying to awaken her, Gerald returned to the phone and said that Mrs. Huntsman wouldn't wake up and that there was blood on her chin.

Mrs. Patterson immediately left the hospital with her supervisor Mrs. Hogen. When they arrived at the apartment they found Miss Huntsman in bed, dead. The police were called. A search of the apartment by police disclosed two pieces of black electrical cord believed to have been used to strangle the victim.

> At approximately 9:00 a.m. that morning, detectives from the Salt Lake County sheriff's office went to Sims' home. They were aware of

the facts alluded to above, and had other information, including the fact that there was another rape charge pending against defendant Sims, which led them to investigate the possibility of his being involved in the crime of concern here. His mother answered the door and admitted them into the living room. Asked about her son, she said he was asleep, but she would wake him. Shortly he appeared dressed only in a pair of Levi's. After introductory remarks, the officers told him that they were there in inquiry about an incident involving some of his friends. Detective Benjamin Forbes read to him the "Miranda Warning" from a card; and asked Sims if he understood his rights. He answered, "Yes"; and when asked if he would mind talking to them he said, "No. Go right ahead."

Upon being asked about his acquaintanceship with Mrs. Patterson and whether he had been at her apartment the night before, he answered affirmatively. When the inquired about the time, he asked why they wanted to know. They told him that Linda Huntsman had been murdered. Sims then asked if he could call his lawyer and was told that he could. He went to the telephone, and reported back that he was unable to contact his lawyer, because he was in court. The officers asked him if he would go down to his electrical shop with them. It is apparent that they had in mind checking about the black electrical cord which they suspected might be the lethal weapon. Sims agreed to go with them but told them he would have to dress first. The officers then asked him if they could go with him to his bedroom, and there is no dispute but that he gave an affirmative response. While in the bedroom, during the time

Sims was dressing, Detective John Bernardo saw a black turtleneck shirt lying on one of the chairs. Upon it he observed some long strands of light brown hair, which to his mind seemed to match the hair of Linda Huntsman.

When Sims finished dressing in boots, Levi's and a plaid shirt, Detective Bernardo asked him if those were the clothes he had worn the night before. Sims said they were. (It appears that this was either a falsehood, or a serious mistake on a vital matter, because other testimony at the trial was that Sims had worn a black turtleneck shirt the night before.) Sims then drove his truck, and detectives followed in their car, to the shop where the desired inspection was made, but without any significant result.

Petitioner was later arrested and charged with the murder of Linda Huntsman. Further testimony was introduced at trial as to the similarity between petitioner's blood type and the semen found in Miss Huntsman. In addition, an FBI expert testified that fibers taken from petitioner's shorts and levi's at the time of his arrest matched the fibers in the blanket on the victim's bed.

Finally one of petitioner's fellow prisoners in the Salt Lake County jail testified that Sims had told him he (Sims) had raped and killed Linda Huntsman.

From the evidence here summarized, the jury determined the petitioner Sims was guilty of murder in the first degree and recommended he be sentenced to life imprisonment. See *State v. Sims*, 30 Utah 2d 251, 516 P.2d 354 (1973).

Thereafter, petitioner appealed the judgment of conviction to the Utah Supreme Court contending:

1. That prejudicial error was committed in allowing deputies to testify as to what they saw in petitioner's bedroom during an illegal search.

2. That the introduction of statements made by defendant at his home on the morning of March 23, 1971, was reversible error, under the *Miranda* doctrine.

3. That reversible error was committed by the trial court in permitting FBI agents to testify concerning fiber samples, blood spots and semen spots found upon the clothing of appellant seized from him by sheriff's deputies at the time of his arrest and booking in the Salt Lake County Jail.

4. That the careless handling of Sims' clothing by sheriff's deputies rendered any evidence found thereon inadmissible.

5. That defendant was convicted in violatiion of the Fourteenth Amendment to the Constitution of the United States because Section 76-30-3 Utah Code Ann. (1953), as amended, is unconstitutional.

6. That the refusal of the trial judge to grant defendant motion for change of venue was reversible error.

7. That the refusal of the trial court to permit James T. Weston, a qualified pathologist, to testify as to the probable sequence of events commencing with the first physical injury to the victim and terminating with her death was reversible error.

8. That the court's instructions on reasonable doubt are incomprehensible, contradictory and therefore violate the XIV Amendment of the Constitution of the United States.

9. That under the circumstances of this case, the jury was incapable of rendering a just decision comporting with the requirements of due process.

10. That in light of *Furman v. Georgia*, the requirement of a unitary verdict as to guilt and punishment under the circumstances of this case denied the defendant due process of law.

11. That reference by a witness to the fact that Sims had been granted a new trial was prejudicial and reversible error.

12. That the evidence upon which appellant was convicted is clearly insufficient to sustain the verdict.

13. That the investigation and trial of this case denied defendant the fundamental fairness to which he is entitled under the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Utah rejected these contentions and affirmed petitioner's conviction in *State v. Sims*, 30 Utah 2d 251, 516 P.2d 354 (1973), which decision petitioner here seeks review.

ARGUMENT

POINT I

NO EVIDENCE INTRODUCED BY THE STATE IN THE TRIAL COURT WAS OBTAINED IN VIOLA-

TION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner's claim that on March 23, 1971, at approximately 9:00 a.m., he was confronted in the parents' living room by sheriff's detectives who asked him numerous questions without being given his *Miranda* rights. He further alleges that these same deputies followed him uninvited into his bedroom where they commenced and conducted an illegal and unconstitutional search of petitioner's bedroom.

This narration conflicts with the findings of the trial court and the narration of facts contained in petitioner's brief to the Utah Supreme Court. Pages 14 and 15 of petitioner's brief to the Utah Supreme Court reads:

"On the morning of March 23, 1971, Loren Craig Sims was awakened by his mother at approximately 9:00 a.m. Mrs. Sims informed him that there were four policemen in the living room who wanted to talk to him. He entered the front room partially dressed and was confronted with questions by the Sheriff's Deputies concerning his whereabouts on the previous evening. At this point, he was informed that Linda Huntsman had been murdered and was read the standard Miranda warning from a card by one of the police officers. After this warning, and a fruitless effort to contact his attorney, Sims was asked if he would accompany the officers to his place of business. When Sims informed the officers that he would have to dress, they asked him whether they could accompany him to his bedroom. Sims' response, though not precisely clear from the record, appears to be in the affirmative, as much be reason of default as anything, but he may have nodded his head or made a comment such

as "Yeah, come ahead." The result was that a man just aroused from sleep and accosted by the presence of four sheriff's deputies was confronted by the fact that he was obviously a suspect in a murder investigation; this man, without ever having been advised that he had any rights whatever to prevent an unwanted invasion of the private recesses of his home, was accompanied to his bedroom by all four officers who there conducted a thorough visual search. Sims then accompanied the Police to his shop and was subsequently arrested at approximately 1:15 p.m. that afternoon. Respondent respectfully submits that an examination of the facts as set forth above by petitioner in his brief to the Utah Supreme Court reveals no illegal or unconstitutional search."

This court has stated in *Harris v. United States*, 390 U. S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968) that:

> "It has long been settled that objects falling into the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence."

The first issue to be discussed, therefore, concerns whether the officers had a right to be in petitioner's bedroom while he was getting dressed. An examination of the trial court transcript should clarify that problem.

Sometime between nine or ten in the morning, four officers were sent to the home of petitioner as part of a routine investigation. Detective John Barnardo, Salt Lake County Sheriff's Office, testified as to what occurred:

MR. BANKS: Q. And how did you get into the living room?

MR. BERNARDO: A. We knocked on the front door, Mr. Sims' mother answered the door. We identified ourselves and asked if Craig was home. She said he was in bed, that she would get him, and invited us in. (T. 322).

* * *

Q. Was he dressed or undressed when he came into the living room?

A. He had on a pair of levis is all he had on.

Q. At that time was he advised to any of his constitutional rights?

A. Yes Sir. (T. 322).

* * *

(The transcript then reveals that the *Miranda* warning was read to him by Detective Forbes verbatim.)

MR. BARBER: Q. When you gave Mr. Sims his rights, did you ask him whether he understood them?

MR. BERNARDO: A. I didn't give him his right.

Q. When Forbes did?

A. Yes.

Q. And what did Sims say?

A. In the exact words, as I recall, were, "Would you like to talk to us?

Q. And what did Sims say?

A. Yes. (T. 335).

By saying "yes" to a request to talk to officers following a complete enumeration of the *Miranda* rights, petitioner clearly waived them. A more in dept analysis of this issue follows in Point II.

After consenting to go with the officers down to the Shop, Sims said he would have to get his clothes on.

> MR. BANKS: Q. Now, did he leave the living room after that request?
>
> MR. BERNARDO: A. He was going to the bedroom. Yes.
>
> Q. All right. And at the time, was anything said to him?
>
> A. Yes.
>
> Q. And what was said and by whom?
>
> A. I asked him if we could go with him to his bedroom.
>
> Q. And did he reply?
>
> A. Yes. (T. 347-348).

Petitioner's response to that question is not recorded but was recognized by counsel on both sides as being in the affirmative.

While within the bedroom by consent of appellant, Detective Bernardo saw something in plain view about which *he* subsequently testified.

In an effort to find whether a search was actually conducted by the officers, counsel for Sims attempted to get Detective Bernardo to admit to have done more than merely

looking around at what was in plain view. At this, counsel failed (T. 359).

The failure to establish that a search was conducted brings the entire issue outside of the context of the points discussed by petitioner in his brief.

Case law in support of respondent's contention is abundant.

In the case of *Chapman v. United States*, 346 F.2d 383 (9th Cir. 1965), *cert. den.* 382 U.S. 909, 86 S.Ct. 249, 15 L.Ed.2d 161, officers entered a home by invitation while investigating a robbery of papers from a bank. On the floor of the front room they saw scattered papers and charred papers in the fireplace. Testimony concerning what they saw was allowed. There the court said at 386-387:

> "Admittedly, up to the time that the officers, voluntarily admitted to appellant's premises, saw the documents on the floor of her home which had been taken from the bank *after* her termination of employment, they had suspicions only, and no sufficient evidence to arrest the appellant, or to obtain a warrant to search her premises.
>
> * * *
>
> "Appellant, in oral argument, equates the two or three steps taken by an officer to the fireplace to "a search." We do not. It is not a search for an officer to observe (once lawfully near or on and within premises) that which is clerly and plainly to be seen, even if he uses searchlights or field glasses. *United States v. Lee*, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed 1202 (1972)."

In *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964), officers were invited into a home and saw some wastebaskets containing marijuana. There the court said on page 305:

> "However, once legally inside the room, the officers were not required to remain blind to the obvious. . . . It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light. *United States v. Lee*, 274 U.S. 559 47 S.Ct. 746, 71 L.Ed. 1202; *Boyd v. United States*, 4 Cir., 286 F. 930; *Smith v. United States*, 4 Cir., 2 F.2d 715; *Safarik v. United States*, 8 Cir., 62 F.2d 892, 895 * * *. *Pet-Teway v. United States*, 216 F.2d 53, 54 (4 Cir. 1958)."

And in another Federal Court the same conclusion was reached. In *United States v. Atkinson*, 450 F.2d 835 (5th Cir. 1971), we read:

> "The judge's conclusion is in accord with our decisions that items in plain view of law enforcement officers who have a legitimate right to be in a position to have that view are not discovered as a result of a search. *Walker v. Beto*, 437 F.2d 1018 (5th Cir. 1971); *Agius v. United States*, 413 F.2d 915, reh. denied 417 F.2d 635, cert. denied 397 U.S. 992, 90 S.Ct. 1116, 25 L.Ed. 2d 399 (5th Cir. 1969); *Grimes v. United States*, 405 F.2d 477 (5th Cir. 1968). We can find in the record before us no reason to upset his conclusion. We therefore need not reach the question of whether Atkinson consented to the search, since none occurred." *Id.* at 839.

Having legally gained access to petitioner's home and

bedroom, officers could not be prevented from testifying concerning what came to their attention in plain view. No consent to search was necessary since no search was conducted. The only consent necessary was that degree necessary to legally be in the home and the bedroom. The specificity required for this degree of consent is far less than for something like a consent to search, and here, the requisite requirements to be legally on the premises were met.

In light of the above it is clear that the Supreme Court of the State of Utah did not decide the federal issue here involved in a manner inconsistent or contrary to decisions of this Court. Respondent, therefore, respectfully submits that Point I of petitioner's petition does not present an issue for review by this Court.

POINT II

NONE OF PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED IN THE COURSE OF THE STATE'S INVESTIGATION, ARREST AND CONFINEMENT OF HIM.

A. PETITIONER'S CLAIM OF CONSTITUTIONAL ERROR IN THE STATE'S FAILURE TO INFORM HIM OF HIS FOURTH AMENDMENT RIGHTS IS WITHOUT MERIT SINCE NO SEARCH WAS CONDUCTED BY SHERIFF'S DETECTIVES WHILE IN PETITIONER'S HOME AND BEDROOM.

As previously set forth in Point I, sheriff's detectives were given permission by petitioner's mother to enter the Sims' home. They were further given permission by petitioner to follow him to his bedroom while he dressed. The

subsequent testimony by these officers as to what they observed while lawfully present in the house and specifically the bedroom does not constitute the introduction into evidence of items obtained as a result of an unconstitutional search and seizure. See *Harris v. United States, supra, United States v. Lee, supra, Chapman v. United States, supra, Davis v. United States, supra, United States v. Atkinson, supra.* Any claimed violation of Fourth Amendment rights because of an illegal search is clearly without merit because no such search took place.

B. NO CONSTITUTIONALLY GUARANTEED RIGHTS WERE VIOLATED BY THE INTRODUCTION OF STATEMENTS MADE BY PETITIONER AT HIS HOME ON MARCH 23, 1971, IN THE TRIAL COURT.

There is no case subsequent to *Miranda, infra,* interpreting the required warning to the satisfaction of every court, and every set of circumstances. The courts universally hold that each case must be determined upon its own facts. For this purpose, respondent will lay before this Court the facts relevant to the investigation carried on in the home of Loren Craig Sims on the morning of March 23, 1971.

Four police officers under the order of Captain Hayward were sent to the home of Loren Craig Sims as part of a routine investigation aimed at piecing together information from those known to have last been in contact with Linda Huntsman prior to her death (T. 32p and 4343).

On their way to the home, the officers were made aware by Detective Forbes that Mr. Sims had been charged

with rape just prior to that time (T. 344). The officers arrived at the home at approximately 9:30 a.m. (T. 321), and after identifying themselves were invited into the Sims living room by Mrs. Sims (T. 322). She awakened Craig and he appeared in the living room shortly, clothed in a pair of levis and no shirt (T. 322).

Following some introductory comments, Detective Forbes read verbatim the *Miranda* warning from a card given him by Detective Bernardo.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 10 L.Ed.2d 694 (1966), the Supreme Court laid out the requisite material to be covered in a warning:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 444.

The card used by Detective Forbes incorporated all of the requite statements lawfully required ,T. 323).

Petitioner was then asked if he understood his right and Craig said "yes." (T. 331). He was then asked if he would mind talking to them and he said, "No, go right ahead." (T. 336), following which more questions were placed before him. After approximately five minutes, Craig said he would like to call his attorney and was invited to do so by the officers (T. 336). He was unable to contact his attorney and returned to his discussion with the police officers (T. 339 and 341). He then went to his bedroom and got

dressed. This was done pursuant to a request made by the officers that Craig take them down to his shop (T. 347).

While in the bedroom, Detective Bernardo asked Craig whether or not the levis, shorts, and plaid shirt he was then wearing were the same clothes he was wearing the night before, to which he replied, "Yes." (T. 481, 492, 508).

It is this statement by Sims which the petitioner feels was incorrectly allowed into testimony because it lent some question to his credibility. There was other testimony indicating that Craig had not been wearing the plaid shirt but had been seen in a black turtleneck T-shirt, seen that morning in Sims' bedroom with long strands of hair on it. The five of them then left the home; the four officers in their car, and petitioner, by himself, in his truck and joined together again at the shop (T. 340).

1. THE DISCUSSION BETWEEN POLICE OFFICERS AND PETITIONER AT HIS HOME ON THE MORNING OF MARCH 23, 1971, WAS NOT A "CUSTODIAL INTERROGATION" REQUIRING OBSERVATION OF THE *MIRANDA* RIGHTS.

Respondent contends that petitioner was not a suspect of the officers at that time (T. 343), was not under arrest and was not even in their custody during the period of time they visited with him in his home.

There was never any evidence presented that force was used during that morning in the home. No weapons were drawn, no threats were made, no accusa-

tions placed and the entire atmosphere was one of a routine investigation of a very serious crime. Sims was not placed under arrest at that time, and there was no indication that Sims was confined to the presence of the officers, and during the entire oval investigation, petitioner's mother was nearby in the home (T. 340). Even on driving down to the shop, care was taken to not restrict Sims, as he was allowed to drive his own vehicle alone, merely leading the way for the officers who desired to carry their investigation to the shop. Even at the shop, appellant was not alone but was in the presence of his father (T. 340). A concern over flight or a weapon is a routine police caution, but does not indicate custodial status.

The Fifth Circuit faced a similar set of circumstances in the case of *United States v. Littlepage*, 435 F.2d 498 (5th Cir. 1970), *cert. den.*, 402 U.S. 915, 28 L.Ed.2d 657, 91 S.Ct. 2178.

There two officers visited a man's apartment between the hours of 9:00 or 9:30 am. and aroused him from his sleep. After introductory comments, he too was given his *Miranda* rights and then questioned around the dining room table for one solid hour. Concerning this, the Court said:

> "It seems quite clear that the questioning in the instant case was not accomplished while the defendant was 'in custody . . . or otherwise deprived of his freedom of action in any significant way.' " U 35 F.2d at 499.

The decision in *Miranda v. Arizona* clearly distinguishes between custodial and routine field investigation:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime.
>
> • • •
>
> "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsibile citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.* at 477-78.

No inference can be drawn from the fact that *Miranda* rights were given, that they were necessary. Such an inference was sought by the appellant in the case of *United States v. Akin*, 435 F.2d 1011 (5th Cir. 1970) and the court's reply is worthy of note:

> "We cannot accept appellant's suggestion. To rule that an FBI agent's extra-cautious efforts to inform a person of his constitutional rights converts an otherwise non-custodial situation into 'custodial interrogation' could easily work to defeat one of the Supreme Court's main objectives in *Miranda*, the objective of encouraging law enforcement agencies to develop ways of protecting individual rights that are in harmony with effective law enforcement. We conclude, therefore, that a custodial situation cannot be created by the mere giving of modified *Miranda* warnings."

Clearly the rights were given, not to indicate custody

or arrest, but as a basic precautionary measure imposed by the precedent concern for the rights of the individual.

On the morning of March 23, 1971, petitioner was not in custody and therefore any statements made by him, even in the complete absence of a waiver of his rights under *Miranda*, would be admissible in court against him.

2. EVEN IF THE CIRCUMSTANCES OF THE INVESTIGATION COULD BE CONSTRUED TO BE "CUSTODIAL INTERROGATION." PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHTS UNDER THE DOCTRINE OF *MIRANDA V. ARIZONA*.

The facts are clear that the *Miranda* rights were given the petitioner completely and accurately. Waiver was deemed effective from the time Sims responded to the inquiry of his willingness to talk by the statement: "No, go right ahead." (T. 336). In the minds of the officers there seemed to be no need to insult appellant's intelligence by rephrasing the warning and repeating their questions. The officers knew that Sims was aware of the procedure surrounding investigation and waiver of rights. They knew he was recently charged with the crime of rape and would have had significant exposure to that sort of thing (T. 344). They had no reason to suspect, and no contention has been claimed even before this Court, that he was not fully aware of what he was doing.

In the case of *United States v. Glasgow*, 451 F.2d 557 (9th Cir. 1971) this type of knowledge on the part of investi-

gating officers was deemed very significant in understanding whether petitioner knowingly and intelligently waived his rights. There the court said:

> "At the time of his interrogation, Glasgow already had an extensive prior criminal record, including a post-Miranda felony conviction. Obvioulsy, he was familiar with police practices. Furthermore, he underwent no apparent difficulty enther in understanding questions asked of him or in making understandable responses during both the interrogation and the trial. These facts justify the District Court's conclusion that Glasgow's waiver was knowing and intelligent." *Id.* at 558.

Petitioner contends that because he could not get in touch with his attorney, he had waived his waiver and could not be held accountable for anything said thereafter. This is a flimsy argument that could have far reaching consequences should it be allowed. Looking retrospectively at any statements made by defendants after an unsuccessful call to an attorney, viable testimony and evidence could be easily stricken in spite of voluntary waivers of *Miranda* rights.

This argument was raised before the Eighth Circuit just last year in the case of *United States v. Scogis*, 459 F.2d 182 (8th Cir. 1972) wherein the court said:

> "The mere fact that she was unsuccessful in reaching an attorney does not prohibit interrogation where it is clear that she knowingly intelligently, and voluntarily elected to proceed without one." *Id.* at 187.

Such are the facts here. This being so, anything said by appellant at that time was admissible as evidence through the testimony of sheriff's deputies involved in those early stages of the investigation.

C. PETITIONER'S SIXTH AND FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN FBI AGENTS TESTIFIED CONCERNING FIBER SAMPLES, BLOOD SPOTS AND SEMEN SPOTS FOUND ON PETITIONER'S CLOTHING SINCE POSSESSION OF SUCH CLOTHING WAS NOT OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT.

All are agreed that the police have a legal right to remove clothing from one under arrest prior to incarceration. All are agreed that the police have a right to search that clothing. Utah Code Ann. §77-54-20 (1953) reads:

> "When a person charged with a felony is supposed to have on his person a dangerous weapon, or *anything which may be used as evidence of the commission of the offense*, the officer making the arrest shall cause him to be searched, and the weapon or other thing must be retained, subject to the order of the court in which the defendant may be tried." (Emphasis added.)

Petitioner would have us draw a line somewhere between the curory examination of the clothing at the moment of disrobing and the subsequent closer examinationn in a laboratory of that same clothing a few days later, beyond which a search warrant must be issued.

Respondent contends that the search which began legally incident to lawful arrest never ceased until the evidence was thoroughly examined. Once an item is properly

seized as evidence, its evidentiary uses are not limited to the moment of seizure. The item may then be examined or used by the police as proper investgation dictates.

The purpose of a search warrant in Utah is spelled out fully in Utah Code Ann. §77-54-1 (1953) which reads:

> "A search warrant is an order in writing, in the name of the State, signed by a magistrate and directed to a peace officer, commanding him to search *for* personal property and bring it before the magistrate." (Emphasis added.)

Here, the personal property was already legally inn the hands of the police. A warrant to search "for personal property was not necessary to search that property already legally acquired.

Petitioners argument on this point noticibly void of case law to support his specific point. Respondent does not suffer from that same affliction.

An examination of a portion of that supporting case law should suffice to satisfy the vacuum of any borderline logic.

The Sixth Circuit in *Clarke v. Neil*, 427 F.2d 1322 (6th Cir. 1970) examined a similar complaint. There the Court stated rather abruptly on page 1325:

> "This argument is rejected. We do not consider the laboratory examination of a suit after its seizure by the police to constitute a search within the meaning of the Fourth Amend ment. . . ."

Not being considered a search under the meaning of the Fourth Amendment, no warrant is necessary.

Similar circumstances were presented before the District of Columbia Circuit Court in the case of *Robinson v. United States*, 283 F.2d 508 (D.C. Cir. 1960) at 509 wherein tthe Court stated:

> "Appellant . . . complain that their clothing was removed at police headquarters, shortly after their arrest, and was subjected to tests at the laboratories of the Federal Bureau of Investigation."

Then, after explaining the results of the tests on the clothing, the court continued:

> "We think that this procedure was proper, since probable cause to believe appellants guilty of housebreaking and larceny had already appeared, and appellants were validly under arrest therefore."

Another Federal Court has dealt with this problem several times. In the case of *Goliher v. United States*, 362 F.2d 594 (8th Cir. 1966) the Court made this statement:

> "Although the constitutional issue was not raised, we recently approved the seizure of the arrested persons' clothing and the admission of scientific comparison evidence found thereon. *McNeeley v. United States*, 353 F.2d 918 (1965). Even when presented with the constitutional issue, all the cases of which we are aware have specifically upheld, on various grounds, the validity of seizing the clothing worn by the arrested individual and subjecting the same to scientific tests later admitted into evidence."

Finally, two state court cases are worthy of note. In *Commonwealth v. Aljoe*, 420 Pa. 198, 216 A.2d 50 (Penn. 1966), the court held that appellant was not subjected to unreasonable search and seizure when tests were made upon his clothing, which was removed after his arrest, which revealed that stains on his trousers contained traces of brain tissue.

The Supreme Court of Georgia in *Elinburg v. State*, 179 S. E. 2d 926 (Ga. 1971) ruled that clothing taken from appellant at the time of arrest did not amount to illegal search and did not render the evidence obtained therefrom inadmissible in a prosecution for rape.

Therefore, here, either this was a continuation of a legally initiated search, or not a search at all, and therefore no search warrant was required and evidence obtained from the clothing was admissible in court.

D. PETITIONER'S CLAIM OF CONSTITUTIONAL ERROR IN THE HANDLING OF HIS CLOTHING BY SHERIFF'S DEPUTIES IS WITHOUT MERIT.

Petitioner claims that a violation of his constitutional right of due process occurred as a result of alleged careless handling of evidence by Sheriff's Deputies. Respondent respectfully submits that such an allegation points to the weight to be given the questioned evidence. Any constitutional issue raised in this context is not of significant magnitude to warrant review by this Honorable Court. This position is strengthened by the ruling in the case of *Barrington v. Missouri*, 205 U. S. 483, (1906) wherein this Court declined to pass on alleged due process violations resulting

from the admittance of certain evidence, where it was clear that the trial court had satisfied itself regarding its admissibility and the State Supreme Court had affirmed (at 486). A similar situation is present in the case at bar. The evidence in question was not obtained as a result of an illegal search or seizure. Therefore, the mere allegation that evidence is inadmissible because of alleged mishandling does not present a constitutional question of significant import to warrant review.

Respondent again submits that the question here raised is one involving the weight to be given the evidence. The issue is therefore one for jury determination. *United States v. Clark*, 425 F.2d 827 (3d Cir. 1970); *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960).

E. PETITIONER'S CLAIM OF CONSTITUTIONAL ERROR REGARDING THE INTRODUCTION OF PHOTOGRAPHIC EVIDENCE SHOULD BE DISMISSED SINCE NO SUCH OBJECTION WAS MADE IN THE LOWER COURT PROCEEDINGS.

Respondent respectfully submits that petitioner has failed to object to the introduction of photographic evidence in preivous state court proceedings and therefore is now precluded from making such a claim of error.

Even if such a claim were now made the question as to the admissibility of such evidence is to be resolved by the trial court. Reversal on such grounds is only granted where there is found a clear abuse of discretion.

POINT III

PETITIONER HAS FAILED TO PREVIOUSLY

RAISE THE ISSUE CONTAINED IN POINT III IN PREVIOUS COURT PROCEEDINGS AND IS PRECLUDED FROM DOING SO NOW.

The general rule articulated by this Court is that a petitioner cannot raise in petition before this Court federal questions not previously raised in state court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) and *Edelman v. People*, 344 U.S. 357, 358 (1953).

An examination of petitioner's brief to the Utah Supreme Court fails to show that this federal constitutional issue was raised on appeal to that tribunal. Petitioner is therefore now precluded from raising such an issue before this Court in this petition.

POINT IV

THE PROVISIONS OF SECTIONS 76-30-1 THROUGH 76-30-3, UTAH CODE ANN. (1953) ARE NOT UNCONSTITUTIONAL AND THEIR APPLICATION IN THE CASE HERE INVOLVED DID NOT DENY PETITIONER HIS RIGHT TO DUE PROCESS.

To enable the Court to follow petitioner's reference to jury instructions, it should be noted that appellant mistakenly refers to and quotes the jury instructions given in August, 1971, during the first trial of appellant instead of the instructions given in November, 1971, during the second trial which is the guilty verdict being appealed here.

The Utah felony murder rule is set out in Utah Code Ann. § 76-30-3 (1953):

> "*Every murder* perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premediated killing; or *committed in the perpetration of, or attempt to perpertrate, any* arson, *rape,* burglary or robbery; or perpetrated from a premediated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life: — is murder in the first degree. *Any other homicide* committed under such circumstances as would have constituted murder at common law in the second degree." (Emphasis added.)

It is evident when one considers the phrase "any other homicide" and the fact that no other "homicide" is indicated above, that the legislature meant "every homicide" and not "every murder" in the first line of the statute and fully intended that the commission, or attempted commission, of specific felonies satisfy the need to find "malice" for a murder conviction as required by Utah Code Ann. § 76-30-1 (1953). Murder is the unlawful killing of a human being with malice aforethought. This argument is substantiated further by the legislature's inclusion in every subdivision of Section 76-30-3 which describes murder in the first degree, except the subdivision listing specific felonies, of some statement on malice — "*malicious* and premeditated," "unlawfully and *maliciously*," and finally, "evidencing a *depraved mind,* disregardless of human life." If the legislators had intended a specific finding of malice, they would have enacted Section 76-30-3 with the language "or *maliciously*

committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery."

Petitioner contends that a separate finding of malice is necessary to sustain a constitutionality of a conviction under the Utah felony murder rule, but cites no felony murder cases to guide this Court other than *State v. Mewhinney*, 43 Utah 135, 134 P. 632 (1913). Petitioner attempts to discredit the *Mewhinney* decision where the Supreme Court upheld the felony murder rule. Justice McCarty stated in his concurring opinion in that case:

> "I am unable to conceive a state of facts or circumstances, and certainly none has been suggested, under which a murder committed in the perpetration of an attempt to perpetrate any of the felonies mentioned in section 4161 [arson, rape, burglary or robbery], would or could be less than murder in the first degree. As I have stated, the elements of first degree murder, namely, premeditation and deliberation, that distinguishes first degree murder from second degree murder, are not essential, when the crime is committed in the perpetration of or attempt to perpetrate any one or more of the felonies referred to, to make the crime murder in the first degree."

At 159, Justice McCarty quotes the California Supreme Court from *People v. Milton*, 145 Cal. 169, 78 P. 549 (1904), saying:

> "The murder, under section 187 of the Penal Code, is established, in that the killing is unlawful, it having been perpetrated in the performance or attempt to perform one of these felon-

ies [arson, rape, robbery, burglary, or mayhem], and the malice of the abondoned and malignant heart is shown from the very nature of the crime you are attempting to commit."

This Court devoted a large portion of the opinion in *State v. Russell*, 106 Utah 116, 145 P.2d 1003 (1944) to explaining the malice and intent necessary for a conviction of murder and, in particular of murder in the first degree. The Court stated at 126:

> "In order to have the necessary *malice* to commit murder (not necessarily murder in the first degree), the killing must be unlawful, it must result from or be caused by an act or ommission to act committed with one of the following intentions: (1) an intention or design previously formed to kill or cause great bodily injury; or (2) an intention or design previously formed to do an act or omit to do an act, knowing that the reasonable and notural consequences thereof would be likely to cause death or great bodily injury; or (3) a previously thought out intentional or designed perpetration or attempt to perpetrate one of certain kinds of felonies. This is not limited to arson, *rape,* burglary and robbery mentioned in § 103-28-3, U.C.A. 1943 (sic), but does not include all felonies." (Emphasis added.)

Thus, the two elements required to indicate the necessary malice for the killing to be "murder" in the present case are (1) that "the killing . . . be unlawful," and (2) that the act of killing result from the intentional perpetration of "one of certain kinds of felonies," that is, rape.

The Court goes on to indicate how the legislature set

the boundaries between first degree murder and second degree murder and quotes the statutes which was applicable then, Utah Code Ann. § 103-28-3(2) (1943), now Utah Code Ann. § 76-30-3 (1953). "Every murder committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery is murder in the first degree." The Court interpreted the statute by saying: intent to commit the felony is transferred from that offense to the homicide acutally committed." 39 Utah at 217. The jury only needed to find that the appellant killed the victim during the course of the commission of the crime of rape. The intent to rape, according to Justice McCarty and the Court in *Russell, supra*, is transferred to the killing itself to support a charge of murder in the first degree.

Malice in murder may be either express or implied. 76-30-2 U.C.A. 1953. It is implied when the circumstances of the killing occur such as would evidence a depraved heart such as when the individual is engaged in the commission of a serious felony such as rape. In *People v. Sears*, 2 Cal. 3d 180, 465 P.2d 487 (1970), the California court observed:

> The felony-murder rule operates (1) to posit the existence of malice aftrethought in homicides which are the direct casual result of the perpetration or attempted perpetration of *all* felonies inherently dangerous to human life, and (2) to posit the existence of malice aforethought *and* to classify the offense as murder of the first degree in homicides which are the direct casual result of those six felonies specifically enumerated in section 189 of the Penal Code. [Citation.] (70 Cal. 2d at 538.)

It would appear therefore that no actual finding of malice is necessary nor need of instruction to such extent be given to the jury. Malice has evolved into a term of art with reference to the law of homicide. It does not approximate its literal meaning. LeFevre & Scott, *Criminal Law* at 528, 1972. The only finding necessary is that the defendant's conduct the proximate or legal cause of the victim's death. *LeFevre & Scott, supra,* at 546.

Petitioner quotes Mr. Justice Harlan from *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed 205 (1887), as stating:

> It belongs to the legislative branch of government to exert what are known as the police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, the public safety." (Appellant's brief at 55.)

Respondent strongly endorses that view and submits that the Utah legislature, in enacting Utah Code Ann. § 76-30-3 (1953), was fulfilling that charge. Utah Code Ann. § 76-30-2 (1953) indicates that "malice may be express or implied. . . . It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." The legislature evidenced, by selecting the specific provisions of "arson, rape, burglary or robbery" for codification in Utah Code Ann. § 76-30-3 (1953), the conclusion that, in the words of the California Supreme Court, "the malice of the abandoned and malignant heart is shown from the very nature of the crime." The Utah legislature also finds support from

the Model Penal Code, which although suggesting that felony murder be limited to acts "committed recklessly under circumstances manifesting extreme indifference to the value of human life," suggests that the accused be required to rebut the presumption that sufficient indifference and recklessness existed if he were "engaged, or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape." Proposed Official Draft § 210.2 (1962).

Petitioner contends that the Utah legislature cannot impute malice without denying a defendant the due process guaranteed by the United States Constitution, but cites no cases on point. Respondent contends that the Utah legislature was exerting the police powers in determining "what measures are appropriate or needful for the protection of the public morals, the public health, the public safety," as outlined above by Mr. Justice Harlan. Since the legislature has more resources for making studies to determine what is best for the general good of the community, such questions are better determined by the legislature than the courts.

The crime of rape is an inherently dangerous crime. Even if it were determined that it was not, the way in which this particular rape of Linda Huntsman was committed was not only "greatly dangerous" to her life, but also evidence "a depraved mind, regardless of human life," sufficiently to place this homicide under the first degree murder portion of Section 76-30-3 (1953) and to malice under Section 76-30-2 (1953). She was subdued with a cord around her neck which eventually strangled her.

Appellant's objection to the jury instruction on felony murder is untimely. The Utah legislature did not intend to require a separate showing of malice with the specific felonies listed in Utah Code Ann. § 76-30-3 (1953). If the court finds the Utah legislature did intend a showing of malice with those specific felonies, the circumstances surrounding this particular rape clearly indicate an abandoned and malignant heart sufficient to imply malice aforethought.

For these reasons, respondent respectfully submits that petitioner's point 4 must be rejected.

POINT V

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT DENIED IN THE TRIAL COURT'S REFUSAL TO GRANT A CHANGE OF VENUE.

An accused does not have an absolute constitutional right to a change of venue. Only when it is shown that the fairness guaranteed by the Constitution cannot be afforded an accused because of publicity, is a change of venue in order, and then only if the trial judge determines that pretrial publicity has so prejudiced the court proceedings that the likelihood of fairness is in grave question. The trial court's decision in this regard is reversed only on a clear showing of abuse of discretion. No such showing has been made.

It is recognized that there was publicity commensurate with the magnitude of the crime. This cannot, nor should not be eliminated. A mere showing of publicity on its own, however, is not sufficient grounds for granting a change of venue. The likelihood of prejudice must be shown to be so

persuasive that it would influence the jury and prevent a fair trial.

The case of *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), cited as support for petitioner's position, involved prejudicial news coverage carried to the extreme.

> "Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; that he was a 'abare-faced liar' because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child." *Id.* at 356-7.

Such glaring prejudice is found nowhere in the news coverage of the Craig Sims trial.

The court in *Estes v. United States*, 335 F.2d 609 (5th Cir. 1967), *cert. den.* 379 U.S. 964, 13 L.Ed.2d 559, 85 S.Ct. 656, rehearing den. 380 U.S. 926, 13 L.Ed.2d 814, 85 S.Ct. 884, took some reasoning from the Supreme Court decision in *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962) when they said:

> "There was no specific showing of bias and prejudice by appellant resulting from the widespread publicity, and the fact alone of such pub-

licity did not in itself constitute a sufficient showing of bias and prejudice."

Petitioner cites *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) to support his contention. A close reading of that case will show that the appellant there had become a notorious celebrity in a relatively small county — not like petitioner in our case. In building up to their decision in the case the court discussed their feelings regarding normal publicity for a criminal prosecution. In 366 U.S. at pages 722 and 723 they said:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois*. 123 U.S. 131, 31 L.Ed. 80 8 S.Ct. 21, 22; *Holt v. United States*, 218 U.S. 245, 54 L.Ed 1021, 31 S.Ct. 2, 20 Ann. Cas. 1138; *Reynolds v. United States*, 98 U.S. 145, 155, 2 L.Ed. 244, 146."

The Court is clear in stating that if a juror is aware

of the facts and even has an opinion regarding them, so long as he can lay aside that opinion and render a verdict on the facts, there has been no reversible error committed. In *Sinclair v. Turner*, 20 Utah 2d 126, 434 P.2d 305 (1967) *affirmed*, 447 F.2d 1158 (10th Cir. 1971), *cert. den.* 391 U.S. 924 (1968), this Court held that the fact that jurors may have become aware of purported facts of a case through publicity does not disqualify them if they can swear to impartiality. See also *Sinclair v. Turner*, 447 F.2d 1158 (10th Cir. 1971) *cert. den.* 391 U.S. 924, 88 S.Ct. 1822, 20 L.Ed.2d 663 (1968)

A close reading of the transcript will show that out of the twelve jurors and one alternate selected for the jury, only four of them had heard anything regarding this case or the deefndant Loren Craig Sims. Those jurors were Joseph John Jacob (T. 229); Irene Jones (T. 74-76); Barbara Christensen (T. 79-80); and Rulon D. Billingsley (T. 217). The prospective jurors were so honest in their responses that one of them admitted having read the name of the petitioner on a bulletin board in the hall of the Metropolitan Hall of Justice the day he appeared for jury duty (T. 219).

When Mr. Jacob was asked whether he could set aside anything he had heard and rely on the evidence he said he "definitely would be able to set that aside" (T. 230). When Irene Jones was asked a similar question, her reply was "I think I could, uh-hum" (T. 74). When Barbara Christensen was asked if she had any doubt that she could not set aside what she had read, she said "No" (T. 80). Mr. Billingsley's reply to the question of whether he could set aside what he had heard was "I think so." (T. 219).

The judge was careful when he got the jury seated to admonish them very specifically to remain aloof from all outside influences of publicity (T. 235) and carried on that practice, as he is required to, each time the jury left the courtroom.

Appellant has failed to show any way in which the jurors were or could have been prejudiced to the point of not being able to disregard the things that they had confronted in the past.

For the above reasons, respondent respectfully submits that no constitutional error was committed.

POINT VI

THE INTRODUCTION OF THE TESTIMONY OF ROBERT YOCKEY AND THE REFERENCE BY A WITNESS TO A PREVIOUS TRIAL DID NOT DEPRIVE PETITIONER OF HIS RIGHT TO A FAIR TRIAL.

A. PETITIONER OBJECTION TO THE TESTIMONY OF ROBERT YOCKEY IS WITHOUT MERIT.

Petitioner has failed to show that the testimony of Robert Yockey was perjured. In an effort to show that Mr. Yockey's testimony was perjured petitioner has mis-stated said testimony. The following examples illustrate.

Yockey testified only that Gerald, the eight year old son, answered the door (T. 677, 699) not that petitioner rang the doorbell. In fact both Mrs. Patterson (T. 192) and her son Gerald (T. 341) testified that they had no doorbell at the apartment.

Yockey testified that petitioner hollered at the baby-sitter, not that Gerald did so (T. 677, 700).

Yockey testified that he was never told how the victim was strangled and that petitioner never said how he killed the girl (T. 707), certainly not that he chocked her with his hands until she died, as petitioner's version of Yockey's testimony states.

The medical examiner testified not only that the victim had one bruise consistent with a blow on the head by a fist, as petitioner indicates at 107, but also that the victim could have been knocked out with a second blow not sufficiently hard to cause a second bruise (T. 956-957, 965), consistent with Yockey's testimony that petitioner struck the victim twice (T. 709). Defense counsel attempted to get Yockey to state that the victim was hit in the mouth, but Yockey, consistent with the testimony of Dr. Weston, the medical examiner (T. 956-957), testified that the victim was hit on the head, not in the mouth (T. 701, 702).

On cross examination with defense counsel zeroing in on those specific elements of Yockey's testimony that he considered inconsistent, Jay Edmonds still corroborated Mr. Yockey's testimony about petitioner's leaving his wallet in the apartment on purpose, victim's awaking from effects of the blow, while petitioner was making love to her, and petitioner's striking the victim on the head twice (T. 733-734). Mr. Edmonds further testified that Mr. Yockey related the story without any questions or answers from members of the District Attorney's staff (T. 373). Mr. Yockey testified that he was never told about the evidence in the

case prior to giving his testimony (T. 1126) and that he had seen no pictures of the crime (T. 1127).

This Court should consider the following elements of Mr. Yockey's testimony about which defense counsel, knowing that these elements were supported by other testimony, did not wish to ask.

The main thing that would appear illogical about Yockey's testimony is that petitioner told him he had committed the crime. There were two inmates who Yockey stated confessd to him, Craig Lorn Sims and Mark Richmond (T. 690, 648).

Mark Richmond corroborated Yockey's testimony, stating that he talked to Yockey about the second degree murder he was charged with and admitted to Yockey that he had killed his wife (T. 752), as Jay Banks indicated Yockey told him (T. 733). Richmond also testified that he told Yockey none of the details of the crime with which he was charged (T. 752), which is exactly what Yockey stated (T. 690). The fact that Mark Richmond admitted his crime makes it more logical that petitioner admitted his.

Yockey testified that Petitioner was in the living room with the victim before he left with Mrs. Patterson (T. 674-675), as did Mrs. Patterson (T. 187).

Yockey testified that petitioner took Mrs. Patterson to the hospital (T. 674), as did Mrs. Patterson (T. 240).

Both Gerald Patterson (T. 342-343) and Mr. Yockey (T. 675) testified that petitioner left his wallet in the apartment, and that Gerald was the one who answered the door (T. 340, 353, 676, 699).

Yockey (T. 675-677), Mrs. Patterson (T. 171-173), and Gerald (T. 334, 335) all indicated that the girl who was killed was the baby sitter.

There is other testimony that is consistent with and supports the testimony given by Robert Yockey. Although no robe was found at the murder scene on March 23, 1971, Brian Jessop testified that Linda, the victim, kept a white robe with blue flowers on it at the Patterson apartment (T. 634), and that Linda always wore the robe when she went to the door in the evening (T. 634-635). The fact that an object was not at the murder scene does not necessarily prove there was no such object there earlier, but only indicates that the object was not at the murder scene when the police investigated it. The perpetrator of the crime could easily have removed the robe from the scene and disposed of it elsewhere.

On the morning of March 23rd, N. D. Hayward questioned Gerald in the presence of his mother and Karla Hogan, a nurse who worked with Mrs. Patterson. At the time Gerald could not remember if he had closed the door after the Petitioner (T. 941-942). Mrs. Patterson also indicated that her son is a heavy sleeper (T.| 193), a fact further evidenced by the length of time Mrs. Patterson had to let the phone ring to wake Gerald in the morning (T. 191, 273). After Petitioner picked up his wallet, he could have wainted a few minutes until Gerald was asleep again, walked in, committed the crime, and then told Yockey that the crime took place in front of the boy to make the story more dramatic or to make the story appear questionable should Yockey ever tell anyone what he had been told.

It should be clear that not only has petitioner failed to show that the state knowingly introduced purjured testimony but has has failed to show that purjuried testimony was introduced. No where has petitioner shown Mr. Yockey purjuried himself or admitted that he did so. All that has been shown is inconsistencies which would logically go to the credibility of the witness and the weight to be given his testimony. Such being the case, this honorable court has previously chosen not to rule. *Glasser v. United States.* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

Respondent respectfully submits that such a stance now be taken.

B. REFERENCE BY A WITNESS TO PETITIONER'S PREVIOUS TRIAL WAS NOT PREJUDICIAL ENOUGH TO CONSTITUTE REVERSIBLE ERROR.

Contrary to petitioner's claim, Robert Yockey at no time made a statement in court that petitioner had previously been convicted of the crime of murder.

Respondent therefor contends that said statement was not sufficiently prejudicial to warrant reversal or a new trial. The reference to the previous trial does not appear to be intentional nor malicious. Further, the jury was admonished to disregard the statement. This procedure is accepted and followed by courts throughout the nation as being the proper and most effective way to deal with evidence that is deemed should never have come to the ears of the jury.

Respondent submits that this statement considered in light of the remedial measures taken by the court is not significant enough to require or warrant reversal at the

present time. The fact that the trial court, only after discussion with counsel for both parties, ruled that no significant error had not accured is further evidence of the lack of prejudice.

It should be noted that contrary to petitioner's claim, the possible occurance of a previous trial was only alluded to in the testimony of Rober Yockey. No comment was made by F.B.I. agents or the prosecutor in this regard.

There being little likelihood of prejudice, respondent submits that petitioner's constitutional issue is not of sufficient consequence as to require review by this court.

POINT VII

AT THE TIME OF TRIAL AND ON APPEAL TO THE UTAH SUPREME COURT, PETITIONER FAILED TO ASSERT THAT HE WAS SUBJECTED TO DOUBLE JEOPARDY. HE IS THEREFORE PRECLUDED FROM NOW MAKING SUCH AN ASSERTION.

Petitioner has failed to assert, either in the trial court or on appeal to the Utah Supreme Court that his prosecution for murder constituted a violation of his right to be tried once for the same offense. He is therefore now precluded from making such a claim. See *Edelman v. People*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Cardinale v. Louisana*, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

Even if such a challenge had been made in the lower court, it would have lacked merit. Judge D. Frank Wilkins, presiding judge in the petitioner's first trial, declared a mistrial because of the use of certain evidence; specifically, a

blood sample obtained from the petitioner and a black T-shirt, which was ruled to have been illegally obtained. A date was subsequently set and petitioner was granted a new trial. The guilty verdict of that subsequent trial is the subject of the present litigation. The declaring of a mistrial and subsequent retrial does not constitute a violation of an accused's constitutional rights. *Yori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).

POINT VIII

THE TRIAL COURT'S INSTRUCTIONS ON THE MATTER OF REASONABLE DOUBT DID NOT VIOLATE THE DUE PROCESS PROVISIONS OF THE CONSTITUTION.

It should be pointed out that petitioner in setting forth his objection to jury instructions has cited for review by this court instruction on reasonable doubt used at petitioner's initial trial. A mistrial was declared in those proceedings as stated in point VII.

Respondent assumes that petitioner is referring to instruction numbers 15 and 16, issued by the court at petitioner's later trial. Instruction 15 reads as follows:

> "Proof beyond a reasonable doubt is that degree of proof that satisfies the mind and convinces the understanding of those who are bound to act conscientiously upon it. A reasonable doubt is not one that is merely possible, fanciful or imaginary, because most everything relating to human affairs is open to some possible doubt.

But a reasonable doubt is one which is real and substantial; it is a doubt based upon reason and one which reasonable men (and women) would have upon a consideration of all of the evidence. It must arise from the evidence or the lack of evidence in the case.

If, after an impartial consideration and comparison of all the evidence, you can honestly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if after such impartial consideration and comparison of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

The instruction on circumstantial evidence, No. 16, was as petitioner quotes his number 15 from the first trial held in August.

Utah law on the issue of jury instructions requires that objection to jury instructions be made at the time of trial. Petitioner's attorney failed to make the required objection. See *State v. Anderson*, 15 Utah 496, 286 P. 645 (1930); *State v. Zimmerman*, 78 Utah 126, 1 P.2d 962 (1931). Petitioner was therefore precluded from asserting such an objection on appeal. This view was obviously adopted by the Utah Supreme Court as evidenced by its finding of no merit in the claim.

Aside from the procedural prohibitations to petitioner's claim, his claim lacks substantive merit.

Petitioner argues that the so-called "personal business

test," that reasonable doubt is 'such a doubt as would cause a reasonable, prudent and considerate person to pause and hesitate to take actions pertaining to the more important affairs of his life applies only to measurement of "reasonable doubt" and supplies a standard for the jury to measure only their "doubts" and not their "abiding conviction of the defendant's guilt" as indicted in Instruction No. 15. This test for reasonable doubt was approved in *State v. Williamson*, 22 Utah 248, 62 P. 1022 (1900) and *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910).

Petitioner further argues that [t]his is entirely different from using the personal business test as an affirmative definition of reasonable doubt as was done by the trial court in this case." (Petitioners Brief at 78). Petitioner's argument is that the courts have held the personal business test is to be utilized in instructions only to help the jury determine reasonable doubt, not to determine moral certainty or conviction "beyond a reasonable doubt." This is, of course, a conceptual distinction without a difference on its face. What criteria are used to measure the presence of doubt, by its absence will clearly also define the presence of certainty.

Petitioner seems to argue, although vaguely and without expliciting his contentions, that this application of the "personal business" test is somewhat "unfair" to petitioner and amounts, in fact, to denial of his rights to due process. Evidently, what is meant is that Petitioner feels that use of the "personal business" test to affirmatively define *lack* of reasonable doubt, "abiding conviction of the defendant's guilt" as the trial court put it in Instruction No. 15, shifted the presumption by linguistic means from requiring the jury

to find him not guilty of they entertained *any* reasonable doubt, to requiring them to find him guilty if they were unable to find such a doubt in the case as would prevent them from acting in their personal affairs. The Utah Supreme Court has recently reaffirmed in *State v. Sullivan*, 6 Utah 2d 110, 370 P.2d 212 (1957), at 114, that "reasonable doubt" must amount to more than a "mere possibility."

> "[I]t is not sufficient merely that reasonable minds *may* have entertained such doubt. Before a verdict may properly be set aside, it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it *must* have entertained reasonable doubt that defendants committed the crime. Unless the evidence compels such conclusion as a matter of law, the verdict must stand."

Much earlier, the United States Supreme Court held exactly such an instruction as No. 15 non-prejudicial in *Hopt v. Utah*, 120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708 (1887). In *Hopt* the jury instruction was that the jury had no reasonable doubt if, after consideration of the evidence, they had an abiding conviction of guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs. The Court stated at 618-619:

> It is difficult to conceive what amount of conviction would leave the mind of a juror free from reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact

sciences and actual observation there is no absolute certainty.

* * *

Persons of speculative minds may in almost every case suggest possibilities of the truth being different from that established by the most convincing proof. The jury are not to be led away by speculative notions as to such possibilities.

This Supreme Court held that this was particularly non-prejudicial where the questioned instruction was coupled with one which required the jurors not to convict if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence. Instruction No. 16 given in this case and quoted by Appellant as No. 15 is just such an instruction. Petitioner still claims that the *Hopt* instructions as approved by the United States Supreme Court amount to "cruel and unusual punishment" of the jurors because they are so ambiguous and contradictory. Petitioners Brief at 79.

It is clear that the trial court's juxtaposition of Instructions No. 15 and 16 was an attempt to meet the *Hopt* constitutional standard as originally set forth by the Utah Supreme Court, and later approved by this Court. This Court has declared that this combination meets the constitutional standard and has not reversed its decision.

Petitioner argument at 78 of Petitioners Brief that the 9th Circuit in *Paddock v. United States*, 79 F.2d 872 (9th Cir. 1935), disapproves the *Hopt* ruling is specious. The quoted matter is not appropriate to the present case.

Paddock disapproved an instruction which set out the

personal business test but went too far in attempting to define the general phrase "[personal] weighty and important matters" by giving specific illustrations and suggesting such a matter would be the purchase of real estate. Petitioner attempts an argument *reductio ad absurdum* using this very illustration at 78 of his brief. The illustration is borrowed fram *Paddock, supra*, where the 9th Circuit did indeed state at 876-877:

> "No court, so far as our examination shows, has attempted to state to a jury just what matters are of sufficient importance to be used in comparison with the decision of guilt in a criminal case which deprives an individual of his life or liberty. Under the usual instruction approved by some courts, each juror is left to determine for himself what he considers the "highly important" or the "more weighty and important matters" affecting his own life. To tell the jury in effect that reasonable doubt has no more significance in deciding a criminal case than the doubt by a juror as to whether the price offered to him for a piece of property is as much as he can expect to get for it, is in our mind to entirely eliminate the doctrine of reasonable doubt from the consideration of the jury."

What Petitioners Brief fails to make clear is that the court in *Paddock* upheld the business test as a proven formulation, and one sanctioned by the United States Supreme Court if not diluted by explanatory examples. Respondents give below an extended quotation from *Paddock* since Petitioners selective quotation at 75 of his brief quotes the court out of context and alters their reasoning.

"There is another objection to these instructions on reasonable doubt which we think worthy of attention, and that is the business test as applied to the decision of a criminal case. This test has been wholly rejected by some courts and sustained by others. For brevity, we refer to cases collated under Decennial Digests, Criminal Law §789 (12), in the American Digest system. Before discussing the matter, we call attention to paragraph V of the supplementary instructions in which the court informed the jury that they should be convinced to that degree of certainty upon which 'you act in your own important affairs.' If the instruction stopped here, it might have been sustained under some of the authorities, although directly contrary to others. The federal courts are bound by the decision of the Supreme Court upon that matter in *Hopt v. Utah*, 120 U.S. 430, 7 S.Ct. 614, 618, 30 L.Ed. 708, where the court approved an instruction upon the subject of reasonable doubt which contained the following: 'But if * * * you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.' While the instruction contained the phrase 'the more weighty and important matters relating to your own affairs," it was no doubt approved because it was a part of an instruction which had fully explained the doctrine of reasonable doubt. We do not believe that court will approve the business test when segregated from the other elements which were included in the instruction approved in *Hopt v. Utah, supra.* We followed *Hopt v Utah, supra, in Shepard v.*

United States (C.C.A.) 236 F. 73, 80. In those decisions which have sustained the business test, the comparison has been confined to the "more weighty and important matters" or to the matter of the highest importance. No court, so far as our examination shows, has attempted to state to a jury just what matters are of sufficient importance to be used in comparison with the decision of guilt in a criminal case which deprives an individual of his life or liberty. Under the usual instruction approved by some courts, each juror is left to determine for himself what he considers the "highly important" or the "more weighty and important matters affecting his own life." To tell a jury in effect reasonable doubt has no more significance in deciding a criminal case than the doubt by a juror as to whether the price offered to him for a piece of property is as much as he can expect to get for it, is in our mind to entirely eliminate the doctrine of reasonable doubt from the consideration of the jury.

We are inclined to agree with the statement of Justice McFarland, speaking for the Supreme Court of California in *People v. Paulsell,* 115 Cal. 6, 46 P. 734: 'If experimental departures from the well-established language sanctioned by all courts upon the subject of reasonable doubt are to be here allowed, and each trial court is to venture upon unusual language to express the idea contained in language so often approved, we will be afloat upon a new and unknown sea, and complications will arise in every criminal case coming here which will be very difficult to unravel." 79 F.2d at 876-877.

It is inapposite if not misleading to quote *Paddock* as over-

ruling *Hopt*. If anything *Paddock* reaffirmed *Hopt's* vitality in 1935 in the federal courts and in those states which adopt the business test. Utah is emphatically such a state since the leading case in modern United States jurisprudence, the *Hopt* case, originated here.

Scurry v. United States, 347 F.2d 468 (D.C. Cir. 1955). referred to by Petitioner at 78 of his brief, is from a jurisdiction which rejects the business test altogether. The law in Utah is to the contrary. As the Utah Supreme Court stated in *State v. Sullivan, supra*, at 114:

> "[W]here circumstances otherwise strongly suggest guilt, the doubt should be real and substantial and not one that is merely possible or imaginary. All that is required is that the jurors have an abiding conviction of the defendant's guilt such as they would be willing to act upon in the more weighty and important matters relating to their own affairs."

Petitioner argues lustly that Instruction No. 15 and No. 16, taken together, set up an insoluble conflict for jurors since the former pronounces a subjective standard, "proof that satisfies the mind and convinces the understanding," whereas the latter is objective, requiring acquittal if evidence can be interpreted "on any reasonable ground other than the guilt of the defendant." Taken as a whole, Petitioner claims these instructions preclude a fair trial and violate rights to due process.

Petitioner comments about the difficulty of defining "reasonable doubt" and distinguishing between preponderance (civil) and beyond a reasonable doubt (criminal)

quanta of proof are well taken and representatively reflected in the quoted portion of *Paddock, supra.* The introduction of such terms as "satisfies the mind and convinces the understanding," perhaps better terms than those objected to by Petitioner at 78 cannot be reasonably supposed to throw an average venireman into an insoluble quandry. Many jurors will be unable to distinguish between objective and subjective standards in any case. Far from being a disadvantage, jury subjectivity has been hailed by highly respected commentators as the genius of the jury system, an informal way of ensuring expression of the conscience of the community. See Kalven and Zeisel, *The American Jury* (1966), *seriatim.* Conceptually it is indistinguishable whether a court calls on jurors for their convictions of guilty "beyond a reasonable doubt" based on failure to accept any other hypothesis as reasonably explaining the evidence (Instruction No. 16) and asking the jurors to state their mind's or understanding's "abiding conviction of the defendant's guilt," unallayed by any such resitation as would prevent their acting in their own important affairs (Instruction No. 15). Petitioner's argument is without merit.

For the above reasons, respondent respectfully submits that no issue requiring review by this Court exists in petitioner's point eight.

POINT IX

REFUSAL OF THE TRIAL COURT TO ALLOW TESTIMONY IS A MATTER OF DISCRETION AND NORMALLY NOT SUBJECT TO REVIEW BY THIS HONORABLE COURT.

As stated by petitioner the discretion of the trial court to exclude expert testimony will not be reversed absent a showing of clear abuse. This proposition is even more applicable in the case at bar since the Utah Supreme Court has previously ruled that no abuse is present.

Petitioner has also failed to previously raise a constitutional objection to the exclusion of parts of Dr. James T. Weston's testimony and is now precluded from doing so. *Edelman v. People*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953), *Cardinale v. Louisana*, 394 U.S. 437 (1969).

In addition to the infirmities set forth aboue, petitioner failed at the time an objection was made to the evidence to make the required proffer of proof in order to evercome the objection. The trial court therefore made the proper ruling that the evidence was too speculative. (T. 829).

For the above reasons, respondent respectfully submits that no issue here involved requires review by this Honorable Court.

POINT X

THE UNITED STATES SUPREME COURT, AS WELL AS NUMEROUS OTHER COURTS, HAVE HELD THE UNITARY VERDICT SYSTEM CONSTITUTIONAL, AND SUCH APPROVAL HAS NOT BEEN RETRACTED.

The Utah Supreme Court in *State v. Kelbach*, 23 Utah 2d 231, 461 P.2d 297 (1939), considered the arguments against the unified verdict which appellant now advances and dismissed them as being without merit. The Court said, with regard to the self-incrimination contention:

> "There is nothing in the single-verdict procedure whereby the State coerces the defendant to waive his privilege against self-incrimination. He is compeled to testify only in the sense that it may be to his advantage; this inducement to forego his right to remain silent does not arise from any unneccessary burden imposed by the State." 23 Utah 2d at 234.

On the "unconstitutionally vague" contention, the Court replied by quoting with favor the following language from *Segura v. Patterson*, 402 F.2d 249, 252 (C.A. 10th, 1968):

> ". . . This court has discovered not one successful attack upon the discretion allowed the jury in this context. Perhaps this is because it is neither desirable nor feasible to postulate a specific standard to so control the jury. It is axiomatic that the line between contemporary community values and the penal system is filed by the jury's being allowed to be reflective of prevailing social thought. To assert that the adoption of rigid guidelines seeking to control the jury in this respect, thereby substituting merciless standards for present day flexibility, is compelled by due process is clearly untenable." 23 Utah 2d at 235.

Two years before the *Kelbach* case the United States Supreme Court, in *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed. 2d 606 (1967), ruled that the Constitution allows unitary verdict proceedings in capital cases.

> "To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested,

and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter constitutional law, or even as a matter of federal procedure. With recidivism the major problem that it is, substantial changes in trial procedure in countless local courts around the country would be required were this Court to sustain the contentions made by these petitioners. This we are unwilling to do. To take such a step would be quite beyond the pale of this Court's proper function in our federal system." *Id.* 385 at 567-568. (Footnotes omitted)

In 1971, the United States Supreme Court made the definitive statement on the unconstitutionality of unitary verdice proceedings in capital cases when it decided *McGutha v. California* and *Crampton v. Ohio*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). In *McGautha*, the Court observed:

"The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected from a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that the compassionate purpose of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined." 402 U.S. at 221.

Commenting specifically on the latitude given juries under the unit ary verdict system, the Court said:

> "In 'light' of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the tntramelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awsome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete." 402 U.S. at 207-208.

Other jurisdictions have no numerous occasions since *McGautha v. California* upheld as constitutional the unitary verdict procedure. In *Roman v. Parrish*, 328 F. Supp. 882 (E.D. Va. 1971), appellant petition on this issue was withdrawn after the *McGautha* decision came down. Other such holdings are found in *State v. Kassow*, 28 Ohio St. 2d 141, 277 N.E. 2d 435 (1971); *State v. Anderson*, 28 Ohio App.2d 234, 277 N.E. 2d 64 (1971); *State v. Terry*, 472 S.W. 2d 426 (Mo. 1971); *State v. Thompson*, 59 N.J. 396, 283 A.2d 513 (1971); and *State v. Boggs*, 80 Wash. 2d 427, 495 P.2d 321 (1972).

In opposition to this mass of authorities, Petitioner cites

not the language, not the holding, but the *effect* of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), along with a hypothetical fact situation. The *Furman* decision states nothing of overruling *Crampton v. Ohio*, and was specifically directed to verdicts placing defendants on death row, not to verdicts of life imprisonment. The United States Supreme Court further explained its holding in *Furman* in a recent case, *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d. 29 (1973):

> "In *Furman v. Georgia*, 408 U.S. 238 (1972), our mandate was tailored so as to deny to the State only the authority to impose a punishment which we held unconstitutional, without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus the prejuidice to the State resulting from the necessity of an entire new trial because of procedures newly found to be constitutionally defective, with the attendant difficulties of again rounding up witnesses whose memories would be necessity be dimmer for the second trial than for the first, was not present. That which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire factfinding process anew." 98 S.Ct. at 878.

Petitioner creates an interesting hypothetical situation and then, without authorities to guide this Court and without any proof that the facts in the case before the Court were as stated in the hypothet, contends that such a hypothet violated Petitioner's Due Process rights. Such conjecture is no basis for holding Utah's untary verdict system

unconstitutional, particularly in light of the United States Supreme Court cases, the Utah Supreme Court cases, and the cases from other jurisdictions squarely opposed to Appellant's contentions.

On the weight of authorities indicated above, this Court should deny petitioner's petition based on the unconstitutionality of Utah's unitary verdict system.

POINT XI

THE JURY WAS FULLY CAPABLE OF RENDERING A JUST DECISION COMPORTING WITH THE REQUIREMENT OF DUE PROCESS.

Respondent submits that the issue raised by petitioner is clearly without merit. Petitioner is attacking the jury system established and sanctioned by the founding fathers and specifically made an integral part of our society.

The case of *United States v. Parks*, 411 F.2d 1171 (2d Cir. 1969), cited by petitioner, is easily distinguished from this case by the point upon which that decision turned. In that case the jury had reported to the judge that it was tired and the judge made them continue deliberation. Such was not the case here. There was no indication that they were tired, and no requests were made to wait until the next day, and no objection was raised by appellant to the continued deliberation.

Petitioner's objection to the jury verdict rendered in this case is without merit and need not be reviewed by this Court.

POINT XII

THE INVESTIGATION AND TRIAL OF THIS CASE PROVIDES PETITIONER WITH THAT FAIRNESS TO WHICH HE IS ENTITLED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. PETITIONER OBJECTION TO EVIDENCE OF HIS BLOOD TYPE IS UNTIMELY AND WITHOUT SUBSTANTIVE MERIT.

Petitioner contends that evidence of his blood type resulting from a blood sample taken from him should be excluded as a violation of the exclusionary rule, since previous evidence of blood type was obtained under a defenctive warrant, and as a violation of his right against self incrimination.

If this Court were to review the admission it would find it nonprejudicial, and therefore to be ignored. There was other evidence admitted during the trial to indicate that Petitioner's blood type was A. Mr. Robert Beams testified that he had received a pair of levis which were being worn by the Petitioner at the time of his arrest, that he tested a semen spot on the right leg of those levis, and that the person who deposited that semen on the levis had type A blood (T. 577-587). Defense counsel produced a witness who admitted to having sexual intercourse with the petitioner while he was wearing similar levis (T. 1111-1112). Petitioner himself argues at Point XII of his brief that the spot of semen on his pants came from him during the sexual act mentioned above. There was ample evidence for the jury to conclude that Petitioner had A type blood without the testi-

mony concerning the blood test to which Petitioner now objects.

This Court should deny Petitioner's objection to the blood type evidence as untimely, as not being based on a properly specific objection in the trial court, and as non-prejudicial.

Petitioner's objection is also without basis in substantive law. Neither the exclusionary rule nor the right against self-incrimination require that evidence of blood tests be withheld from the jury.

Petitioner argues that the exclusionary rule set forth in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1694, 6 L.Ed. 2d 1181 (1961) requires the exclusion of the blood test evidence since previous blood test evidence was obtained under a defective warrant. The exclusionary rule has never required that new evidence obtained under a valid warrant separate and distinct from the evidence obtained under an invalid warrant must be excluded because it indicates what the previous evidence indicated. If the issuance of a new warrant, the taking of the blood, and the testing thereof took place with the same blood, the evidence may be inadmissible. The *Mapp* decision indicated that state courts must exclude *illegally* seized evidence from criminal prosecutions. Here, the evidence was not illegally seized. There is not even any evidence in the record that Petitioner resisted the taking of the blood sample. The second blood test was a separate event based on a valid warrant covering entirely new evidence and was properly admitted by the trial court.

Petitioner contends secondly that Article I, §12, of the Constitution of Utah is broader in its scope than the language

of the Fifth Amendment to the United States Constitution since Section 12 uses the phrase "compelled to give evidence against himself" which is the Fifth Amendment. The Washington Court in *State v. Moore*, 79 Wash. 2d 51, 483 P.2d 630 (1971), indicted that the federal provisions and Washington State's provisions, under Art. I, §9 which has the same language as Utah's Art. 5, §12, provide identical protection although worded differentlq. The majority of courts in Jurisdictions where this question had arisen have found the state and federal self-incrimination statutes to be identical in application though different in form, as will be shown after an overview of the federal law on excluding blood tests as self-incriminatory.

The right against self-incrimination arises first of all from the Fifth Amendment to the United States Constitution which provides that "No person . . . shall be compelled in any criminal case to be a witness against himself," which *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 653 (1964), held applied not orly in federal but also in state criminal proceedings.

In applyirg the privilege against self-incrimination, state and federal courts have distinguished between compelling 'communication" or "testimony," unconstitutional, and compelling a suspect or accused to the source of "real or physical evidence." *Hot v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed 1021 (19); *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957).

The specific question of whether the taking of blood against one's will and its introduction into evidence violated Fifth Amendment guarantees against self-incrimination was

answered by the Supreme Court in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The Court held that blood test evidence is "real" or "physical" evidence and does not violate the privilege against self-incrimination by compelling "communication" or "testimony."

Blood test evidence is "real" evidence and should not be excluded. The overwhelming majority of jurisidictions with constitutional language similar to Utah's have found blood tests to be outside the constitutional guarantees against "testimonial" self-incrimination. Respondents submit that this Court should follow these precedents.

For all of the reasons indicated above, this Court must find Petitioner's contentions without legal merit.

B. PETITIONER'S ALLEGATION OF BEING DENIED A FAIR TRIAL BECAUSE OF SLOPPY POLICE INVESTIGATION IS WITHOUT MERIT.

Petitioner's assertion that he was "effectively required to defend against all crimes committed that night" is without merit. Petitioner was tried for only one crime, the felony-murder of Linda Huntsman. It was well established by testimony that the crime was committed and death occurred between 11:00 p.m. on March 22, 1971, and 7:00 a.m. on March 23, 1971 (T. 190-191). Requiring Petitioner to account for his whereabouts those eight hours was not unfair to Petitioner. Witnesses for the defense attempted to establish Petitioner's whereabouts from approximately 11:30 (T. 790, 1182) throughout the night (T. 809-812, 834-835). As this Court, in *State v. Spencer*, 28 Utah 2d 12, 497 P.2d 636 (1972), stated at 13,

> The defendant called witnesses to support his defense of an alibi. The evidence adduced for that purpose would indicate that the defendant could not have been at the scene of the robbery at the time it was committed. However, it wouud appear that the jury were not impressed by the defendant's claim that he was elsewhere at the time of the crime.

Because evidence presented by the State may be difficult to rebutt does not mean that the trial was unfair to Petitioner. Petitioner's argument is without merit and should be dismissed as such by the Court.

C. PETITIONER'S OBJECTIONS TO MR. YOCKEY'S TESTIMONY ARE WITHOUT MERIT.

Petitioner's version of Robert Yockey's testimony at 107 and 108 of his brief is not accurate, as the following examples illustrate. As stated in Point VI of Respondent's brief.

Yockey testified only that Gerald, the eight year old son, answered the door (T. 677, 699) not that Petitioner range the doorbell. In fact both Mrs. Patterson (T. 192) and her son Gerald (T. 341) testified that they had no doorbell at the apartment.

Yockey testified that Petitioner hollered at the baby sitter, not that Gerald did so (T. 677, 700).

Yockey testified that he was never told how the victim was strangled and that Petitioner never said how he killed the girl (T. 707), certainly not that he chocked her with his hands until she died, as Petitioner's version of Yockey's testimony states.

The medical examiner testified not only that the victim had one bruise consistent with a blow on the head by a fist, as Petitioner indicates at 107, but also that the victim could have been knocked out with a second blow not sufficiently hard to cause a second bruise (T. 956-957, 965), consistent with Yockey's testimony that Petitioner struck the victim twice (T. 709). Defense counsel attempted to get Yockey to state that the victim was hit in the mouth, but Yockey, consistent with the testimony of Dr. Weston, the medical examiner (T. 956-957), testified that the victim was hit on the head, not in the mouth (T. 701, 702).

On cross examination with defense counsel zeroing in on those specific elements of Yockey's testimony that he considered inconsistent, Jay Edmonds still corroborated Mr. Yockey's testimony about Petitioner's leaving his wallet in the apartment on purpose, victim's awaking from effects of the blow, while Petitioner was making love to her, and Petitioner's striking the victim on the head twice (T. 733-745). Mr. Edmonds further testified that Mr. Yockey related the story without any questions or answers from members of the District Attorney's staff (T. 373). Mr. Yockey testified that he was never told about the evidence in the case prior to giving his testimony (T. 1126) and that he had seen no pictures of the crime (T. 1127).

This Court should consider the following elements of Mr. Yockey's testimony about which defense counsel, knowing that these elements were supported by other testimony, did not wish to ask.

The main thing that would appeal illogical about Yockey's testimony is that Petitioner told him he had committed

the crime. There were two inmates who Yockey stated confessed to him, Craig Loren Sims and March Richmond (T. 690, 648).

Mark Richmond corroborated Yockey's testimony, stating that he talked to Yockey about the second degree murder he was charged with and admitted to Yockey that he had killed his wife (T. 752), as Jay Banks indicated Yockey told him (T. 733). Yockey also testified that he told Yockey none of the details of the crime with which he was charged (T. 752), which is exactly what Yockey stated (T. 690). The fact that Mark Richmond admitted his crime makes it more logical that appellant admitted his.

Yockey testified that Petitioner was in the living room with the victim before he left with Mrs. Patterson (T. 674-675), as did Mrs. Patterson (T. 187).

Yockey testified that Petitioner took Mrs. Patterson to the hospital (T. 674), as did Mrs. Patterson (T. 240) .

Both Gerald Patterson (T. 342-243) and Mr. Yockey (T. 675) testified that Petitioner left his wallet in the apartment, and that Gerald was the one who answered the door (T. 340, 353, 676, 699).

Yockey (T. 675-677), Mrs. Patterson (T. 171-173), and Gerald (T. 334, 335) all indicated that the girl who was killed was the baby sitter.

There is other testimony that is consistent with and supports the testimony given by Robert Yockey. Although no robe was found at the murder scene on March 23, 1971, Brian Jessop testified that Linda, the victim, kept a white robe with blue flowers on it at the Patterson apartment (T.

634), and that Linda always wore the robe when she went to the door in the evening (T. 634-635). That fact that an object was not at the murder scene does not necessarily prove there was no such object there earlier, but only indicates that the object was not at the murder scene when the police investigated it. The perpetrator of the crime could easily have removed the robe from the scene and disposed of it elsewhere.

On the morning of March 23rd, N. D. Hayward questioned Gerald in the presence of his mother and Karla Hogan, a nurse who worked with Mrs. Patterson. At that time Gerald could not remember if he had closed the door after the Petitioner (T. 941-948). Mrs. Patterson also indicated that her son is a heavy sleeper (T. 193), a fact further evidenced by the length of time Mrs. Patterson had to let the phone ring to wake Gerald in the morning (T. 191, 273). After Petitioner picked up his wallet, he could have waited a few minutes until Gerald was asleep again, walked in, committed the crime, and then told Yockey that the crime took place in front of the boy to make the story more dramatic or to make the story appear questionable should Yockey ever tell anyone what he had been told.

Petitioner makes rather loose use of the word "perjury" particularly in light of the problems with testimony given by the following defense witnesses.

Mrs. Ercanbrack testified that she saw a man in white clothes on the landing in front of the Patterson apartment (T. 914) and that she had seen the same fellow in the parking lot earlier in the day (T. 915-916). However, three policemen, N. D. Hayward (T. 934, 935-36, 951), William Oefinger

(T. 1162, 1160), and Benjamin Forbes (T. 1177), testified that when they asked Mrs. Ercanbrack the morning of March 23rd when she should have remembered best, she specifically stated that she did not see anyone outside the Patterson residence when she heard the knocking noises. N. D. Hayward further testified that Mrs. Ercanbrack, when questioned on March 23rd, said she returned home at 3:30, but when questioned on March 29th, she said she arrived home at 2:50 a.m. (T. 943, 945). During the trial she said she got home at 1:15 a.m. (T. 908). Mrs. Ercanbrack also testified that when she saw the man in white pants in the parking lot, he appeared to be talking to Mrs Patterson and her friend (T. 915-916). Mrs. Patterson indicated that there was no one in the parking lot at that time except the neighbors from apartment 6 who just arrived in a taxi and the taxi driver (T. 249-250).

Mr. Sims testified that he saw the Petitioner at 3:00 that morning in the kitchen because the kitchen light was on (T. 836). He then testified a few minutes later that he did not see or hear Petitioner get up later that evening after seeing him come in a little after 1:00 a.m. (T. 837, 878, 866). Mr. Sims also testified that he doubted if he went to sleep all night (T. 864-865) and that he could tell if the water or lights were turned on (T. 875). He then said that he only heard his wife get up one (T. 837). His wife testified that Petitioner was up in the kitchen to get a drink of water at 3:30 that morning (T. 810), that she herself was up at least three time to get a glass of water or go to the bathroom (T. 819-822 and turned the bathroom light on at least twice (T. 820-821). If Petitioner's father was awake all night, and was able to hear and see if the water and lights weer turned on,

why did he fail to hear his wife arise the other two times, something difficult to do when one is awake and in the same room if not same bed with someone else? Petitioner's father admitted to testifying in an earlier hearing that he would be able to hear anyone if they got up, volunteering information about a squeaky board in the hall that would give anyone away (T. 888-890). Loren J. Simns also admitted, however, that he has lost all hearing in his right ear (T. 837-838), cannot hear anything when he sleeps on his left side and that he slept on his left side at least part of the night (T. 838). Bening deft-like that would make it very difficult for him to hear everyone getting up as he said he could.

Besides the conflicts with her husband's testimony pointed out above, there are problems with Mrs. Sim's testimony. She swore that she heard Petitioner come in at either 1:24 or 1:26 a.m. and heard him talk to his father. Loren J. Sims (T. 809). Detective Bernardo testified that he could remember and had taken notes of a conversation with Mrs. Sims the morning of March 23rd when she should have remembered best (T. 1170), during which she stated that she did not hear the Petitioner come in the night before that she was taking medication and seldom heard Petitioner come in (T. 1165) John Bernardo further testified Mrs. Sims said the medicine helped her sleep at night (T. 1170).

Perhaps most revealing is the interchange dealing with Mrs. Sims' medication. Mrs. Sims first admitted to being "under heavy medication" but then denied it after defense conunsel made an objection, almost as if the subsequent denial were coached.

There was a conflict between testimony of Helen Steyl

(T. 790) and her comments to John Bernardo over the phone on March 27th (T. 1164), as indicated above in Point XII of this brief.

There was a conflict between the testimony Lewis Arnold gave at the trial in August (T. 1186) and the testimony he gave during the November trial (T. 1182).

Petitioner would be the first to argue that these "per juries" are just "inconsistencies" that are bound to occur since human memories are not perfect. Respondent submits that if such is true of defense witnesses, the same is true for the testimony of Robery Yockey in those details that cannot be corroborated by other evidence. As has been shown above, the bulk of Mr. Yockey's testimony can be supported by other testimony and reasonable inferences from that testimony.

If Yockey is prevaricating, the veniremen were intelligent enough to realize to discount his testimony.

Conflicts in testimony are to be resolved by defense counsel's pointing out inconsistencies during cross-examination. To argue as appellant does that cross-examination is not effective enough is to argue that jurors are not competent to tell where the truth lies, a premise this Court could never accept — as it would necessarily bring an end to trial by one's peers. In *State v. Jarett*, 112 Utah 335, 178 P.2d 547 (1947), this Court stated at 340:

> "On cross-examination the deputy sheriff testified that he was somewhat confused about the full extent of the conversation with the defendant. In addition, appellant points out minor discrep-

> ancies between the testimony given by some of the witnesses at the trial and that given at the preliminary hearing. However, these uncertainties and inconsistent statements go only to the credibility of the witnesses, and to the weight to be given to their testimony. These are properly matters for the jury's determination, and we assume were considered by the jury during its deliberation."

The jury gave the deliberation to the State's witnesses and to the appellant's witness, concluding that the truth lay with the State's witnesses. This Court should hold that appellant's argument is without merit, that the question of credibility of Mr. Yockey's testimony, as with the credibility of the defense witnesses, was for the jury to consider in weighing the testimony and the evidence.

Petitioner's arguments against the testimony of Mr. Yockey are without merit and should not be allowed by this Court.

D. PETITIONER'S OBJECTIONS TO THE POLICE INVESTIGATION ARE WITHOUT MERIT.

Petitioner contends that the police investigation was so shoddy as to deny petitioner his right to a fair trial. Closer consideration of the specific allegations shown them to be without merit.

Petitioner first argues that the Salt Lake Police Department should have tested for minor blood groups as well as the major ones. When asked if the F.B.I. laboratory, the laboratory that did the testing, "could have determined more

accurately than we have determined now the possible source of those stains by doing those tests, is that not correct?", Mr. Robert Beams of that laboratory stated, "It's not correct." (T. 581). Mr. Beams stated, "We don't run these other blood group systems routinely in the laboratory" (T. 581). When Dr. Weston was asked if the semen found in the body of the victim could be used for typing, Dr. Weston said that sperm cannot be typed after it is mixed with the body fluids of the victim (T. 968-969). There was no reason to fault the Salt Lake Police for not testing for minor blood groups.

Petitioner next argues that the police should have investigated Mrs. Ercanbrack's story of the stranger dressed in white. As indicated above in the comments on the inconsistencies in Mrs. Ercanbrack's testimony, William Oefinger (T. 1162), Benjamin Forbes (T. 1177), and N. D. Hayward (T. 934-946) all testified that Mrs. Ercanbrack stated specifically that she saw no one outside the Patterson apartment. N. D. Hayward testified further that if the police department had received a report of a man in white clothes, they would have conducted an investigation for that man (T. 948). The police department should not be faulted for not investigating someone about whom they had heard nothing and for whose existence the Petitioner relies on testimony with many inconsistencies. Petitioner's arguments are without merit and should be dismissed as such by this Court.

POINT XIII

THERE EXISTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT.

In the case of *Glasser v. United States*, 315 U.S. 60 (1942), this Court stated, "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence taking the view most favorable to the government to support it." *Id.* at 80. Viewing the evidence in a light most favorable to the government in this case the state requires that the jury verdict be sustained. A review of the evidence before the court may be appropriate:

1. While Petitioner had a valid reason for going to the Patterson apartment the first time, the circumstances of his proven second visit to the apartment infer some predetermined course of action about which he was perhaps nervous. Consider petitioner's first comments after the eight year old Gerald finally answered the door, "Is your mom home?" (T. 341). Petitioner knew full well that Gerald's mother was at the hospital because appellant had taken her there and knew she worked until 7:00 a.m. (T. 240). There is the further testimony by Robert Yockey that appellant confessed in an informal conversation in jail that he left the wallet in the Patterson apartment with the intent of returning and "hustling" the baby sitter, Linda Huntsman (T. 675-676).

Petitioner contends in his brief at 95 that "the only evidence as to the time of death indicated that the victim was still alive when Sims left the second time." The only evidence of the time petitioner returned to pick up his wallet comes from Gerald, who only states that it was dark outside (T. 340) and from Robert Yockey, who states only that it was after petitioner had taken Mrs. Patterson to work (T. 675-676) and could have been twenty minutes to an hour

later (T. 707). Without evidence to pinpoint more exactly when appellant returned to the Patterson apartment, one cannot say that "the victim was still alive when Sims left the second time." According to Yockey's testimony, the only testimony that gives an idea of when petitioner returned Linda Huntsman was dead when petitioner left after picking up his wallet (T. 708).

2. The State did not contend that the sole means of placing petitioner in the room where the murder occurred was that appellant had type "A" blood, which type blood and semen were found in the murder room. As to the allegation that "some leading writers" consider evidence of blood type too prejudicial and too lacking in probative value to be admitted, appellant fails to assist the Court by naming these writers and citing their words. The fact was clearly made known to the jury that 40 percent of the people in the United States have "A" type blood (T. 585). It was the province of the jury to decide what weight should be given to appellant's blood type as well as to the fact that Brian Jessop also had type "A" blood. A mere alternative possibility does not thoroughly rebutt a proven fact.

3. Petitioner's reference to the small number of fibers from appellant's levis, levi jacket, and shorts found to be identical to fibers from the blanket under which the victim was found, does not obviate the fact that such fibers were on appellant's clothes. Petitioner refers to these fibers as being "highly mobile," but Robert E. Niell, an F.B.I. expert on fibers, testified that such fibers would not float more than one foot if dropped in the air (T. 614). Petitioner may have been in the Patterson apartment containing the source blanket, Exhibit 23), but he had not been in the bedroom where

blanket was since February 12, over a month previously. As to Petitioner's contact with Charlene Patterson who had been in the bedroom and had sat on the blanket, Mrs. Patterson testified that before Petitioner kissed her she put on a coat (T. 236) which was a long coat with long sleves. (T. 265). She also did not touch him until she gave him a quick kiss before running into the hospital (T. 240). Mr. Neill also testified that secondary transfers, that is from a cloth that has picked up a fiber to a third cloth are less certain to occur than the initial transfer. (T. 608).

None of this contact in the Paterson apartment or with Mrs. Patterson explains the fibers found on Petitioner's shorts, which Mr. Neill testified were identical to those found on the blanket (T. 595, 600), unless Petitioner took his levis off while in the Patterson apartment, a presumption supporting the State's case. Petitioner's father indicated that Petitioner had taken a bath after dinner that evening (T. 834). Would Petitioner have put on dirty shorts? The presumption is that he put on clean shorts.

4. Petitioner's contention that deputies accompanying Petitioner into his bedroom with his permission were making an "illegal detour" has been proven false in Point I.

Petitioner's contention that "None of the other three officers then in the same room saw any such thing," is without proof. Mr. Bernardo indicated that he was with Detectives Forbes, Cannon, and Wall (T. 463). The only one of those three to testify was Detective Forbes whose testimony was that although he did not see the black turtleneck shirt when he glanced that direction, Detective Bernardo indicated that such a shirt was there by asking Petitioner a question

about it (T. 536-537). Testimony was also given by Charlene Patterson (T. 184, 235), Brian Jessop (T. 624), and Helen Steyl (T. 793, 795, 796) that Petitioner was wearing a black turtleneck shirt the evening of March 22. This was contrary to Petitioner's comments to Detective Bernardo (T. 481, 508) that the clothes he was putting on, including a red plaid shirt, were the clothes he had worn the night before.

Detective Bernardo's testimony about the black turtleneck shirt was supported by sufficient other testimony for the jury to conclude that he was telling the truth.

5. Elissa Snow, who testified that Petitioner had had intercourse with her four nights before, could not positively identify the levis that Petitioner wore that night as the same levis he wore March 22, which levis were presented into evidence in court with the semen spot on the leg (T. 1118). There was further problem with her testimony in that she claimed to know exactly what Petitioner wore March 18th and March 22nd, but could not remember what he wore on March 8th, March 9th or 10th, or on a third date between March 9th or 10th and March 19th when Petitioner visited her or gave her a ride (T. 1114). The only occasions she could remember what Petitioner was wearing were March 19th and March 22nd (T. 1115). It is not logical that she would be that much more observant on those two particular days.

There is indeed substantial basis for the jury to believe the State's theory that Petitioner got the semen on his levis when he raped Linda Huntsman. Mr. Yockey's testimony of Petitioner's confession that the State's theory is in fact what happened. The fact that drops of semen were also found on

the victim's panties (T. 575-576) and on the sheet on which she was lying (T. 576) indicate the probability that Petitioner dripped on his own clothing, which probability the semen on Petitioner's levis substantiates.

Helen Steyl testified that Petitioner came in the Sandpiper Lounge at "about eleven-thirty" and then more specifically, "eleven-thirty," not at 11:25 as Petitioner claims at 97 of his brief. Miss Steyl said she looked at the clock to fix the time (T. 790, 796, 799-800) but she also indicated that she had had a telephone conversation with Detective Bernardo on March 27th. Detective Bernardo testified that according to his memory and his notes, Miss Steyl told him on that occasion that she was "more or less guessing at the time." She never indicated to Detective Bernardo that she looked at the clock to fix the time either when Petitioner or when Lou Arnold came in. Since that was only five days from the night, a reasonable assumption is that she remembered more accurately then than eight months later during the trial. This is particularly true in light of her comments that on March 27th she knew Petitioner was charged with murder, "still didn't believe it," and was trying as best she could to recall (T. 805).

Lou Arnold testified that he arrived at the Sandpiper Lounge "Just shortly after eleven-thirty" but later admitted testifying during a hearing in August to arriving "about twelve o'clock" (T. 1186).

Petitioner's mother testified that she heard Petitioner come home about 1:24 or 1:26 a.m. (T. 809) and that she saw Petitioner at least three other times during the night (T. 810, 811). However, Detective Bernardo testified that

according to his memory and according to his notes, Mrs. Sims told him on March 23rd when he was questioning her that she had not heard Petitioner come in, that her husband might have, and that she seldom heard Petitioner come in because she took medication for a heart condition (T. 1165). The pattern of Mrs. Sims' testimony at 824 also casts doubt on the reliability of her testimony.

> MR. BANKS: Q. Now, actually during this period of time you were under heavy medication, weren't you?
>
> A. (MRS. SIMS): Yes.
>
> MR. BARBER: Objection. That calls for a conclusion.
>
> MR. BANKS: She knows whether she was or not.
>
> MR. BARBER: May not know what heavy medication is, nor may the jury.
>
> MR. BANKS: I'll never know unless she answers it.
>
> THE COURT: You may answer yes or no.
>
> MR. BANKS: Q. You were under heavy medication?
>
> A. (MRS. SIMS): No. I was not.

Mrs. Sims, who has an obvious interest in seeing that her son is not convicted, seems to have responded to defense counsel's objection by changing her answer to the question.

Petitioner's father, Loren J. Sims, testified that he went to bed at 12:00 (T. 834), 1:30 by the clock

to bed at 12:00 (T. 834) but was up shortly after 1:00 when Petitioner came home (T. 834), 1:30 by the clock (T. 835). There are problems with Mr. Sims' testimony, though. He testified that he saw Petitioner up at 3:00 a.m. and that the kitchen light was on (T. 836). Later he testified in direct contradiction that he did not see or hear Petitioner get up during the night (T. 865, 866) and admitted that he had testified in a previous hearing that he did not hear the floor squeek that night, that he did not see Petitioner again that night after the conversation when Petitioner came home, that he did not hear the water taps in the kitchen turned on, and that he did not see any lights on in the kitchen that night (T. 878-879). Again one finds the same trend that the testimony gets better with the second hearing, despite the fact that a witness' memory would logically be better in August five months after the incident than in November, eight months after the murder.

Clearly after viewing the evidence in a light most favorable to the state, and in view of the contradicting evidence offered by petitioner, the jury verdict must be sustained.

POINT XIV

THE UTAH SUPREME COURT RULED ON ALL THE ISSUES RAISED BY APPELLANT ON APPEAL

In its opinion, the Utah Supreme Court stated, with regard to the issues petitioner here alleges:

> "The defendant has asserted other claims of error which we do not regard as being of sufficient merit to justify discussion, except to say that we have found no error which either singly

> or collectively causes us to doubt that the defendant was accorded what the law entitles him: an opportunity to have all of the evidence on both sides of his case presented to an impartial jury in a fair and proper manner, who unanimously believed beyond a reasonable doubt that he was guilty of the crime charged." *State v. Sims,* 30 Utah 2d 251, 516 P.2d 354 (1973) at 357.

The Utah Supreme Court clearly reviewed all of the issues raised by petitioner on appeal. The fact that the court did not choose to respond specifically to each allegation does not evidence a denial of due process.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6397

LOREN CRAIG SIMS,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court Rules, 28 U.S.C., County for Respondent certifies that copies of the Respondent's Brief in Opposition have been served by mail on Loren Craig Sims, Petitioner in Pro Se, at the Utah State Penitentiary, P. O. Box 250, Draper, Utah, this 21st day of May, 1974.

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